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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 90

MARTIN E. WOLIN, Individually, MARTIN E. WOLIN, LTD., and CHAL STEEL CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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May, 1954.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Petitioner Martin E. Wolin respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this cause, which affirmed a judgment of conviction entered in the United States District Court for the Eastern District of Virginia.

OPINIONS BELOW.

The opinion of the Court of Appeals affirming the District Court is as yet unreported. It is to be found at R.

147. The District Court judgment is to be found at R. 22.

JURISDICTION.

Petitioner was charged with the violation of Title 18, Sections 201, 281 and 371, United States Code. The judgment of conviction of the District Court was entered on October 15, 1953. Petitioner filed notice of appeal on October 16, 1953. The judgment of the Court of Appeals was entered on April 9, 1954. On April 16, 1954, petitioner filed a timely petition for rehearing, which was denied on April 29, 1954. Jurisdiction of this Honorable Court is invoked under 28 U. S. C., Section 1254(1).

STATEMENT OF THE CASE.

Petitioner Martin E. Wolin was indicted and convicted of bribing [1] a Government official, Henry Bennett, to issue licenses for the export of tinplate. It is conceded that payments were made by check to Twila Bennett, the wife of Henry Bennett, and deposited in their joint bank account. The only issue in the case below was whether the purpose of these payments was to influence the official action of Henry Bennett or whether they were commissions on account of orders for tinplate placed with Wolin by a customer sent to him by the Bennetts. The issue which we urge here on certiorari deals solely with the methods which the prosecutor used in order to obtain a conviction.

Wolin was an exporter, with offices in New York City. He specialized in the exportation of secondary tinplate. During all times material to this cause, the shipment of tin abroad required a license from the Office of International

[1] The indictment charges bribery of a government employee (18 U. S. C. § 201); it alleges that petitioners aided and abetted a government employee to receive compensation for performing services in a matter in which the United States had an interest (18 U. S. C. § 281); and it charges conspiracy to violate the laws of the United States (18 U. S. C. § 371), particularly the two sections above stated. (R. 2-21)

Trade in the Department of Commerce. Henry Bennett was the licensing officer in charge of this office.

Wolin first met Mr. Bennett and Mr. Bennett's wife Twila in June of 1951. Shortly thereafter, as Wolin testified, Twila Bennett called him by telephone to tell Wolin she knew a Venezuelan customer named Pardo who might be interested in purchasing secondary tinplate from Wolin. Since Wolin's business had gone to pieces during the second quarter [2] of the year, he received the news enthusiastically. The customer appeared and placed substantial orders.

Wolin testified that shortly after the shipments began, Mrs. Bennett raised the question with him of whether or not she was entitled to a commission for sending the South American purchaser to Wolin. Wolin agreed that she was and further agreed to forward to her the usual fee for such services—$5.00 per ton of shipment. Accordingly, as shipments were made to the new customer, checks were drawn in Twila Bennett's name and sent directly to her. There was no attempt to hide the transaction; the checks were reflected on the books of Wolin's corporations, and declared in the Bennetts' joint income tax return for the year. In fact, two—$226.40 and $310.47—were exact multiples at the rate of $5.00 per ton of two of the shipments; the third—in the lump sum of $100.00—was intended to be charged against commissions to become due. A fourth check for $1,972.00 was approximately at the rate of $5.00 per ton and the discrepancy in the amount was fully explained by Wolin. (The Government used circumstantial evidence to attack his explanation.)

The Government conceded that the customer Pardo came to Wolin at the suggestion of the Bennetts, and that the shipments had been made on his orders. It conducted the trial, however, on the theory that the sending of checks to Mrs. Bennett as commissions was a sham to conceal the real transaction. The checks sent to Bennett's wife were,

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[2] About 80 percent of Wolin's business during the relevant time in this case came from Pardo.

the Government claimed, actually intended as bribes to Bennett himself to issue licenses for shipments to Pardo, Wolin's new customer, and to others. Wolin denied this, as outlined above.

The Government produced Henry Bennett as a witness. He had plead guilty to accepting bribes from Wolin in the transactions at issue in this case. His testimony on the stand, however, corroborated completely Wolin's story that the money was paid as commissions and not to influence his official action. He explained that the customer Pardo, because of his control of the tinplate market in Venezuela had a preferential position to receive licenses on his orders. (R. 29, 81, 80) And in his testimony he reiterated over and over again that he received the money, not as bribes, but as commissions on the basis of the usual finder's fee of $5.00 a ton. (R. 72, 31, 34, 35, 48, 51)[3] Bennett contradicted Wolin only by insisting that it was he and not his wife who procured Pardo as a customer for Wolin.

Clearly, if the jury were to believe Bennett's statement that these payments were not intended to influence Bennett in his official duties, but rather intended to serve as commissions, it should have found defendant not guilty. This is precisely the effect of the trial court's charge.

> "Even if these checks were intended for H. G. Bennett, yet if they were not intended to influence him in his official functions, such as in the approval of license applications, but were commissions to compensate him for his procurement of a customer for Wolin, then the defendants would not be guilty of bribery." (R. 126).

Again on conspiracy (R. 129-130) the court instructed that if the defendants agreed

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[3] For example, Bennett testified in direct answer to the question as to the purpose of the payments

> "Q. Was there any conversation about how much was going to be paid, what rate or anything like that? A. $5.00 per ton was to be paid commission for any sales of any party sent to Mr. Wolin." (R. 31)

> "with either of the Bennetts or with both of the Bennetts, only to compensate Twila Bennett or Henry G. Bennett for the services of either of them in procuring a customer for Wolin, as the Court has stated in reference to the compensation and bribery statutes, then the defendants have not committed the crime of conspiracy because that would not be an unlawful purpose."

The purpose of the payments was in the light of these instructions the sole issue in this case.

In order to discredit Wolin's story as to who sent the customer, Twila Bennett (Bennett's wife) was called. Twila Bennett had also been indicted with Wolin in the same indictment and on account of the same transaction. She had plead guilty to aiding and abetting in the bribery of her husband and of conspiring to bribe him. She had not been sentenced. (R. 102) Her testimony produced by the Government in Wolin's trial was, in substance, that she had never contacted Wolin in regard to the Venezuelan customer. She stated that she had not known Wolin had secured orders and made shipments to Pardo during the period in question, or that Wolin had agreed to reimburse the Bennetts for their finder's service, or that the payments by Wolin were for this purpose. She signed the checks, she said, at the request of her husband without inquiring or being told what was the significance of these large checks payable to her. (R. 101, 100, 87, 88, 91) In effect, she testified under oath she was innocent of the plot—yet she was at that very moment awaiting sentence on her own plea of guilty as a conspirator in precisely the same transactions. And the prosecutor, who had acquiesced in her plea of guilty, in his closing argument vouched for her testimony that she was innocent. (R. 116)

As the case went to the jury, all the prosecution had to support its charge of bribery were the inferences which might be drawn from the fact among other circumstances that Wolin had made checks payable to the wife of the licensing officer which were endorsed by her and deposited in a joint bank account in the name of herself and her hus-

band. The Government's principal witness Bennett had contradicted that circumstantial case by clear testimony that the money had been received as commissions for sending a customer and not for licenses. He had further corroborated that testimony by explaining that there was no point in paying the money for the licenses since Pardo's position in the Venezuelan market gave him a preferred position. (R. 29, 81, 80) Twila Bennett's testimony threw no light on the purpose of the payment. She said she knew nothing about the transaction. And the court's instruction was that it made no difference which of the Bennetts sent the customer if the payments were in fact for commissions.

There was an added circumstance which might explain the curious discrepancies between the guilty pleas of the Bennetts and their testimony. Bennett had admitted taking money in cash from five other exporters. (R. 61-62) The Bennetts were faced with other possible indictments for bribery and for income tax evasion. (R. 61) Twila Bennett though she had pleaded guilty had strong reasons not to say anything that would indicate she had any guilty knowledge of her husband's transactions with exporters.[4]

In any event, the prosecutor was faced with the necessity of explaining the corroboration of Wolin by his own witness Bennett. He did not choose to do so. Instead, he made an outright misrepresentation of Bennett's testimony. In his closing statement, after counsel for defense had completed his argument to the jury and could no longer correct any misrepresentation on the part of Government counsel, the prosecutor proceeded to make what was clearly a direct, detailed and positive misrepresentation of what Bennett had said—a misrepresentation that was the cornerstone of his closing argument. He said:

> "You have had Mr. Bennett on the stand who has told you ladies and gentlemen in so many words in plain and simple English, 'I took money. I took money

[4] Twila Bennett undoubtedly hoped for and later actually received a suspended sentence.

in checks.' Why? Because I am a licensing officer. Bennett has told you in plain and simple English, 'I am guilty.' Why would he tell you that? Because he is." (R. 104).

Bennett had said no such thing. Nonetheless, the prosecutor went on: ". . . if you believe Bennett, even in part, Wolin stands before you, ladies and gentlemen, as guilty as sin and his two corporations, too." (R. 116) "Everywhere you turn you have the corroboration for it, for the man [Bennett] who has admitted he lied in the past but got on the stand and told you the truth. Can you have any reasonable doubt? No. Can you have any doubt?" (R. 117).

The misrepresentation is clear.

At the end of this rebuttal argument, counsel for the defense showed the actual record to the District Judge and requested an opportunity to correct the prosecutor's misrepresentation. The court refused and left the case to the jury with a vague admonition that it was their recollection that governed.[5]

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[5] At the close of the argument for the prosecution the following colloquy took place at the bench (R. 119-120):

Judge Arnold (counsel for defendants): Your Honor, counsel said during the course of his argument: "Bennett testified that he took the money because he was a licensing officer." That is contrary to the record. There is not a line of testimony in the record to that effect. The testimony is that he took the money for selling steel and for commissions. The only testimony which is to the purpose is on page 16 (R. 31) and that testimony does not say anything about Bennett taking the money because he was a licensing officer. The statement is so serious and is such a complete departure from the record that I think that we ought to be allowed at this point to make a statement to the jury that it is not so because the jury will not have the record with them. They will have to rely on memory and counsel's complete misstatement of the record.

The Court: I think that the proper way to handle it is for the Court to charge the jury that what counsel says or what the Court says is the evidence is not binding on them; it is what their recollection of the evidence is that counts. * * *

Mr. Arnold: I do not need an exception?

The Court: No sir.

Counsel for the Government, though confronted with the record, did not offer to make the correction himself. Yet in his argument he had made a special point of his position as a representative of the public trust. He assured the jury that "I never prosecute a case looking for a conviction." He told them "I want to argue it fairly. I have tried to do that and I have." (R. 118) And he emphasized frequently that he followed the suggestions of the Federal Bureau of Investigation in preparing the case.

The jury was not able to reach a verdict. After ten hours of deliberation stretching over two days, the jury advised the court that they could not agree. The district judge told them that a trial was a very expensive proceeding not only in money but in expenditure in every other way. The case had been going on for a week or more. (R. 138) He then read the drastic instructions based on the case of *Allen* v. *United States*, 164 U. S. 492, over defendants' objections. The jury went out and returned a second time. It specifically requested that the Allen instruction be reread. The court did so and the jury was finally able to report, after retiring for a third time, that they had reached a verdict.

Wolin was sentenced to eighteen months imprisonment and fines of $1,000 were imposed on both corporate defendants.

OPINION BELOW.

On appeal, the Court of Appeals rejected the contention that Twila Bennett's testimony had been elicited improperly on the ground that inconsistencies in her testimony were for the jury in determining her credibility and in deciding on the weight to be given to her evidence. (R. 148) With respect to the misrepresentation of Bennett's testimony made by the prosecutor, the court merely said:

> "This was apparently an attempt to give the jury the Government's idea of the total effect of Bennett's testimony and the inferences to be drawn therefrom, *and thus to answer the argument of counsel for defendants that there was no proof of a guilty principal whom*

> *defendants could have aided and abetted.* In the light of the record before us, and the Court's precise charge that statements of counsel of what the evidence was, or what it proved, were in no sense controlling on the jury, we think there was here no reversible error." (citing cases.) (R. 148, emphasis supplied.)

The underlined portion of the opinion is supported by the prosecution's brief, but not by the record. When the argument for the defense was made the reporter was excused. No part of the argument was reported. (R. 103) Yet the Government's brief sets out three pages of what purports to be a summary of defendants' argument before the jury.[6] No such argument was made by the defense. Yet it is from this summary not taken from the record that the court below justifies the prosecution's misrepresentation, on the ground that it was an answer to an argument by counsel for defense.

No such argument was made before the jury. It could not have been made because in all the substantive counts Wolin was indicted as a principal. (See for example R. 8) Bennett's innocence of guilty intent would not have been a defense. Thus at the trial the prosecution misrepresented the record, and again on appeal it inserts a summary of an unreported oral argument made up to justify its conduct. The defense in this case has been faced not only by a misrepresentation of the record at the trial, but also with a misrepresentation on appeal adopted by the court below in spite of protest by defendants' counsel on petition for rehearing. (See petition for rehearing, R. 154).

It is our contention that the court below erred in not condemning the tactics of the prosecution. The use of the Twila Bennett testimony and the closing misstatements of Bennett's evidence by counsel for the Government are not issues which may be closed by reaffirming the jury's ultimate responsibility in finding the facts. The practices here

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[6] A certified copy of the Government brief has been filed in this Court. The alleged summary of the argument for the defense appears on Pages 11-13.

illustrated are far too serious. We think the questions raised by them are as follows.

QUESTIONS PRESENTED.

1. May counsel for the Government, in order to discredit the defendant in a close case, use impeaching testimony which he knows is directly contrary to a plea of guilty previously accepted from that witness?

2. May counsel for the Government, in a close case, affirmatively misstate favorable evidence in his rebuttal argument and decline to correct it when the record is shown him?

REASONS FOR GRANTING THE WRIT.

This case represents such a substantial departure from the accepted and usual course of judicial proceedings in the prosecution of a criminal case as to call for an exercise of this Court's power of supervision. The decision of the lower court is in conflict with the decisions of this Court. To achieve the conviction of the petitioner here the lower court permitted the prosecutor boldly to misrepresent a crucial fact in his closing argument to the jury without permitting its correction. And it permitted the prosecutor to produce evidence prejudicial to the defendant by a witness whom the prosecutor must have believed to be perjuring herself. The prosecutor and the court had accepted a plea of guilty from this witness and yet permitted her to testify to a version of the transaction which would have made her innocent, such version contradicting the defendant's account of the transaction.

The Court of Appeals justified the misrepresentation to the jury on the ground that it presumably was in answer to an argument of defense counsel. Such argument was not in fact made by defense counsel, but had it been, there would have been no excuse for misrepresentation of the facts to the jury or failure to correct that misrepresentation. All this took place in a case where the issue was in close balance and a verdict of guilty was brought in only after the jury

was twice admonished under the Allen instruction to come to agreement. To permit a conviction to stand when achieved by such tactics on the part of the prosecution is certainly such a departure from accepted standards of judicial procedure as to require this Court's intervention. Further, it conflicts with the rulings of this Court concerning the duties of a prosecutor as set forth in *Berger* v. *United States,* 295 U. S. 78, and *Mooney* v. *Holohan,* 294 U. S. 103.

ARGUMENT.

We fully recognize the fact that in the ordinary case, where evidence of guilt is reasonably clear, hard blows by the counsel for the prosecution are not error. But where the evidence of guilt becomes more doubtful, and where it is obvious that the jury had extreme difficulty in arriving at a conclusion, then the prosecution bears a heavy burden to proceed with fairness and objectivity. This Court has said just that:

> "Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in order that the legal rights of the defendant should be preserved. . . . A slight thing may have turned the balance against the accused . . . ." *Burton* v. *United States,* 196 U. S. 283.

This is just such a case and defendant is entitled to every rule of fairness from counsel for the Government. There was here, as the Court found in *Glasser* v. *United States,* 315 U. S. 60, 67, that "slight impetus which swung the scales toward guilt." The only impeaching testimony came from Twila Bennett. Henry Bennett testified in support of plaintiff's statement that the payments were intended as commissions or finders' fees, and not as bribes. Yet the Government adduced Twila Bennett's impeaching testimony knowing it to be flatly inconsistent with her plea of guilt which it had previously secured, and affirmatively mis-

stated the Henry Bennett testimony which corroborated petitioner Wolin. When the record was shown to the prosecutor he objected to any correction and the court sustained him.

Even if the case was not close such conduct shouldn't be ignored. But the case was close. The jury returned twice and could only reach a unanimous verdict after the *Allen* charge had emphasized the cost and trouble of the long trial. Errors of the sort complained of here cannot be ignored.

1. The Government's Use of Twila Bennett's Testimony.

As we point out above, at the time of her testimony on Wolin's trial, Twila Bennett had pleaded guilty to an indictment charging her with being a member of the conspiracy. Yet, as the excerpts from her testimony which follow show, she testified on direct examination by Government counsel to complete innocence (R. 87, 88-89, 90-91, 93, 101). Typical is the following:

> "Q. Now, can you tell these ladies and gentlemen again what happened at the second meeting at the Statler? A. At the second meeting it was very similar to the first. We went into the Embassy Room and had a few cocktails before dinner and then had dinner.
>
> Q. Was there any talk during dinner? A. Yes, they were again talking over licenses and so forth. Of course, as usual, I wasn't paying too much attention to the conversation." (R. 88-89)

In sum, Twila Bennett said she was innocent, that she was not aware of Wolin's arrangement to pay her commissions. The prosecution invited this precise testimony. It put her on the stand. It asked the questions. It claimed no surprise. It expected these statements. And it vouched for them before the jury in closing argument:

> "You know who she's going to be sentenced by, in front of you, don't you, the good Judge that is sitting on the bench right now. Do you suppose she would

want to lie on the stand in front of him? What kind of reasoning is that? It is all the more reason she should tell the truth." (R. 116)

The record certainly indicates that Twila Bennett was not telling the truth. It is scarcely credible that she could have received, endorsed and deposited those checks knowing nothing of the purpose for which they were given. But the prosecutor could not have believed her story, for he did not ask the court that her plea of guilty be withdrawn. He should not be permitted to acquiesce in a plea of guilty to convict Twila Bennett, and then to attack Wolin by vouching for the truth of her lack of participation in the same criminal transaction.

We think the prosecution overstepped the bounds. Affirmative use of such evidence should not be condoned. *Mooney* v. *Holohan*, 294 U. S. 103, long ago established that Government counsel could not introduce testimony it knew to be false; such a practice violates the essential rules of fairness incorporated in the due process clause of the Fourteenth Amendment.

We do not have to rely on due process here. This case presents only the question whether the prosecution violated fair and decent standards. For that reason it was even more incumbent on Government counsel in this case to bear high standards of fairness than in *Mooney*. Twila Bennett's testimony was highly important. If believed, it showed that Wolin was lying. The Government accepted her testimony and endorsed it, knowing full well that it was inconsistent with the plea of guilty. We do not contend that Government counsel conspired with Twila Bennett to perjure herself; we do contend that he supervised the presentation of evidence which he must have believed was untrue as against Twila Bennett's plea of guilty. His responsibility was clearly more serious than that. In *Jones* v. *Commonwealth of Kentucky*, 97 F. 2d 335 (6th Cir. 1938), it was held that the introduction of false testimony even where the prosecution did not know its character

at the trial violated the due process clause and justified collateral attack on the judgment of conviction.

2. The Government Counsel's Misstatement of the Crucial Evidence.

At the close of the presentation of the evidence, Wolin's position was most favorable. He had testified and Bennett had supported him, that the payments had been made as commissions and that there was no intent to bribe Bennett. Circumstantial evidence looked the other way, but Bennett's testimony was strong and the jury might well have concluded that a reasonable doubt of guilt existed. The prosecution, in his rebuttal argument, however, supplied the needed ingredient; he recast completely Bennett's testimony:

> "You have had Mr. Bennett on the stand who has told you ladies and gentlemen in so many words in plain and simple English, 'I took money, I took money in check.' Why? Because I am a licensing officer. Bennett has told you in plain and simple English, 'I am guilty.' Why would he tell you that? Because he is." (R. 104)

Counsel for petitioner protested vigorously. (R. 119-120). The district judge decided, however, that the proper way to handle it was to charge the jury that it is what their recollection of the evidence is that counts. (R. 120).

Clearly, though, this was not the sort of slightly-warped comment on the evidence that may be ignored by the trial court. It went to the very heart of the issues and might very well have been crucial in this close case. Further, it was plainly erroneous. Bennett clearly never stated, as the prosecution put it, "in plain English, 'I am guilty.'" Indeed, he did not testify that the money had been sent to Twila Bennett "because (he) was a licensing officer." Bennett did testify, to the same effect as Wolin:

(1)—that he, Bennett, had told the South American customer that Wolin had the tin plate, and gave him Wolin's address.

(2)—that bribery for licenses would have been pointless because the new customer, as representative of all Venezuelan interests, received them automatically.

(3)—that he had told Wolin to pay the commissions either in cash or checks, "providing a record is made on his (Wolin's) books", and

(4)—that he did not consider the payments as inducements for licenses, but as good faith commissions. We refer the Court to the record, R. 31, 34-35, 37, 48, 51, 71-72.

A misrepresentation of testimony so important to defendant should not be condoned. The case is ruled by *Berger* v. *United States,* 295 U. S. 78. There, as here, the prosecution, in his closing argument, made statements of fact directly contrary to the record or not supported by the record. We think the same "improper insinuations and assertions calculated to mislead the jury", *Id.* at 85, were present here. Our contention is supported by the numerous cases where similar argument and misstatement have been condemned. See *McCall* v. *United States,* 192 F. 2d 468 (5th Cir., 1951); *United States* v. *Sprengel,* 103 F. 2d 876 (3rd Cir. 1939); *Turner* v. *United States,* 35 F. 2d 25 (8th Cir., 1929).

The court below did not attempt to affirm on the ground that the statement was accurate. Instead, it held that it was justified, on the theory that counsel for defendant had invited just such an argument, by his closing statement to the jury. It said:

> "This [the misrepresentation of Bennett's testimony] was apparently an attempt to give the jury the Government's idea of the total effect of Bennett's testimony and the inferences to be drawn therefrom, and thus to answer the argument of counsel for defendants that there was no proof of a guilty principal whom defendants could have aided and abetted." (*Ibid.*)

The court took this not from the record but from the Government's brief in the Court of Appeals,—a self-serving

summary of an argument which was not reported. We have secured a certified copy thereof from the Court of Appeals clerk and it is to be found with the transcript original record in the office of the Clerk of this Court. The original text is to be found in that brief at page 15.

Furthermore, *counsel for the defendant made no such argument,* on the closing or at any other time. Indeed, it would have been idle for him to have done so because Wolin was a principal in the charges of bribery and conspiracy, not an aider and abettor. We protest the tactics of the prosecution. We think the one misstatement of the record in the trial court was quite enough to justify a new trial; the second, made on appeal, we think illustrates the irresponsible standards of the prosecution in getting—and sustaining—a conviction.

Counsel for the United States, in criminal trials, enjoy a high status and respect and have great power to use their position to dilute the essential safeguards of fair trial. Where, as here, there is a serious departure from standards of fairness this Court should exercise its final supervisory authority and condemn the practice.

We do not think that the question we raise here should be brushed aside because of the feeling that it is highly improper for a person dealing with a government official to give a commission to his wife. Had the prosecutor based his case on the inferences which could be drawn from Wolin's conduct there would be no question before this Court on certiorari. But he did not choose to do so. He obtained the conviction by misrepresentation of the evidence and by introducing testimony of innocence from a person who had plead guilty with his acquiescence. If such methods are approved they will soon become standard practice. And it is no answer to the misconduct of the prosecutor to elicit from counsel for the defense, as the Court of Appeals did, the reluctant admission that he considered the conduct of his client reprehensible.

> "Counsel for defendants admit that it was reprehensible here for defendants to employ the Bennetts on

> commission to secure export tin business for defendants, when Wolin well knew no tin could be exported without a license from Bennett, acting in his public official capacity." (R. 150)

Neither unethical conduct on the part of a defendant nor the existence of a circumstantial case against him should be a license to the prosecution to transgress the rules of fair and orderly procedure. And let it not be forgotten that unless the prosecution is held to these rules, the rules themselves will vanish.

CONCLUSION.

We are not asking the Court to review the evidence, close as it is in this case. We are asking it to pass on what we conceive to be highly important issues of Government responsibility in criminal trials. We contend that in this case, counsel for the Government unfairly prejudiced petitioner by adducing evidence he must have believed to be false and by misstating evidence he knew to be favorable to petitioner. We would, therefore, close our argument with the language of this Court in the *Berger* case, *supra* at 88, language we believe to be directly applicable here:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to

produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Respectfully submitted,

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Vause v. *United States*, 53 F. 2d 346, certiorari denied, 284 U. S. 661 15

Statutes:

18 U. S. C. (Supp. V):

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281 3

371 3–4

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